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No. 91-778

In the Supreme Court of the United States

OCTOBER TERM, 1991

LEONA M. HELMSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government violated petitioner's Fifth Amendment privilege against compelled self-incrimination by making improper use of her immunized state grand jury testimony on an unrelated matter.

2. Whether, when petitioner offered expert testimony that she could have claimed additional depreciation deductions in years for which she was charged with tax evasion, (a) the jury was properly instructed that it could disregard the evidence if it found that petitioner had consciously elected to use the method of calculating depreciation employed on her returns and (b) the expert testimony entitled petitioner to a judgment of acquittal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 941 F.2d 71. The opinion of the district court (Pet. App. 72a-91a) is reported at 726 F. Supp. 929.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1991. A petition for rehearing was denied on October 3, 1991. The petition for a writ of certiorari was filed on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to defraud the United States and to commit various offenses, in violation of 18 U.S.C. 371; three counts of attempting to evade income taxes, in violation of 26 U.S.C. 7201; three counts of signing false personal income tax returns, in violation of 26 U.S.C. 7206(1); 16 counts of aiding and assisting in the preparation and presentation of false and fraudulent corporate and partnership tax returns, in violation of 26 U.S.C. 7206(2); and ten counts of mail fraud, in violation of 18 U.S.C. 1341. Pet. App. 7a-8a. The court of appeals affirmed the convictions, but remanded for resentencing on grounds not relevant to the questions presented by the petition.

1. The evidence at trial showed that petitioner and her husband, Harry Helmsley, presided over a network of real estate, hotel, and insurance businesses. Harry Helmsley was the president and sole shareholder of Helmsley Enterprises, Inc. (HEI), an umbrella company that owned all or part of dozens of subsidiary partnerships and corporations. Petitioner was the president of Helmsley Hotels, Inc., a wholly owned subsidiary of HEI that operated several New York City hotels. HEI subsidiaries also included companies that owned and managed commercial office buildings and residential apartment complexes, conducted real estate and insurance brokerage businesses, owned and operated hotels and motels outside New York City, and provided purchasing and other services for hotels and other Helmsley businesses. Pet. App. 3a-5a.

Beginning in mid-1983 and continuing for almost three years, petitioner and her husband arranged for

hundreds of thousands of dollars in personal expenses to be paid by various companies they controlled. The payments were carried as business expenditures on the companies' books and records. Although the scheme encompassed a wide range of personal expenses, many of the largest expenditures related to the renovation and furnishing of Dunnellen Hall, an estate in Greenwich, Connecticut, that the Helmsleys purchased in June 1983. Joseph Licari, Senior Vice President and Chief Financial Officer of HEI, and Frank Turco, Vice President and Chief of Financial Services for Helmsley Hotels, carried out the scheme, using phony invoices that characterized items intended for Dunnellen Hall as business-related goods and services. Pet. App. 5a-6a.[1]

There was abundant evidence of petitioner's personal involvement in the scheme and her awareness of its unlawful tax purpose. Turco kept monthly summaries of the personal expenditures that were charged to Helmsley businesses, showing the vendors that had performed work at Dunnellen Hall and the entities that had paid the bills. He sent the summaries to petitioner and reviewed them with her. Petitioner charged to Helmsley entities (or directed her staff to forward to them) a wide variety of personal expenses. She personally approved false invoices for payment,

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[1] Turco and Licari were tried with petitioner. Each was found guilty of conspiracy, three counts of aiding and abetting the Helmsleys' tax evasion, three counts of aiding and abetting the preparation of the Helmsleys' false returns, 16 counts of aiding and abetting the preparation of false returns for corporations and partnerships, and ten counts of mail fraud in connection with state filings. Neither took an appeal from his conviction. Petitioner's husband was also indicted, but was found incompetent to stand trial. Pet. App. 8a.

made notations on documents summarizing the payments involved, received other such documents, and instructed employees who were uncomfortable with billings to do as they were told. Pet. App. 6a; Gov't C.A. Br. 5-16.

The Helmsleys did not report the personal expenditures made by their companies as income on their personal tax returns, and thus did not pay taxes due on that income. In addition, the firms that paid the Helmsleys' personal expenses reported those expenditures as business expenses, artificially inflating the firms' deductions. Pet. App. 5a-6a.

2. On June 11, 1985, and November 7, 1985, petitioner testified before two New York State grand juries investigating whether two New York jewelers, Bulgari and Van Cleef & Arpels, had evaded the payment of state sales taxes by shipping empty boxes to purchasers' out-of-state addresses. By testifying, petitioner received an automatic statutory grant of transactional immunity. See N.Y. Crim. Proc. Law §§ 190.40, 50.10-50.30 (McKinney 1981 & 1982). In November 1986, after charges were filed against Van Cleef & Arpels, several newspaper articles reported that petitioner had failed to pay sales taxes on hundreds of thousands of dollars of jewelry purchased from that jeweler. The stories identified their sources as court documents filed by the prosecution and defense in the state case and "law enforcement officials." Pet. App. 10a; Gov't C.A. Br. 18.

A *New York Post* reporter, Ransdell Pierson, read the stories concerning petitioner's involvement in the Van Cleef & Arpels sales tax case. A year earlier, he had begun an investigation into possible misuse of corporate funds by the Helmsleys, but had discontinued that investigation. Perceiving a "morality connection" between petitioner's reported involvement in

the Van Cleef & Arpels matter and his earlier project, he reopened his investigation of the Helmsleys. This time, Pierson was more successful in developing the story. In particular, Jeremiah McCarthy, a former vice-president of an HEI subsidiary whom petitioner had fired, provided Pierson with information about the Helmsleys' use of their businesses for private purposes. On December 2, 1986, Pierson published an article in the *New York Post* reporting that expenses incurred in renovating Dunnellen Hall were billed to Helmsley companies. Pet. App. 6a-7a, 11a.

In the meantime, Assistant United States Attorney James DeVita had been conducting an investigation of petitioner's husband on another tax matter. DeVita broadened the investigation to include the charges contained in the Pierson article. He obtained incriminating evidence from McCarthy and also, in response to subpoenas, from Helmsley companies and employees. Ultimately, following a joint state-federal investigation, a federal grand jury returned the 47-count indictment in this case. Pet. App. 11a-12a; see *id.* at 81-82a.

Prior to trial, petitioner moved to dismiss the indictment, contending that the government had made improper use of her immunized state grand jury testimony. The motion sought an evidentiary hearing pursuant to this Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972). The district court denied the motion to dismiss, and it deferred a final ruling on the request for a *Kastigar* hearing until after the trial. Pet. App. 12a, 72a.[2]

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[2] Petitioner sought interlocutory review of the pretrial ruling. The court of appeals dismissed the appeal for lack of jurisdiction. *United States* v. *Helmsley*, 864 F.2d 266 (2d Cir. 1988), cert. denied, 490 U.S. 1065 (1989).

After the jury had returned its guilty verdicts, the district court conducted a limited hearing on petitioner's immunity claim. The court considered the transcripts of the two grand jury proceedings, affidavits from Assistant United States Attorney DeVita and an investigator, and testimony from DeVita and Diane Peress, a lawyer from the New York State Attorney General's office. Peress had been present during one of petitioner's 1985 state grand jury appearances and had later participated in the joint state-federal investigation that culminated in this case. Pet. App. 72a-73a. On the basis of this record, the district court concluded that a further hearing was unnecessary, because petitioner neither "raised a distinct, non-speculative possibility of taint nor satisfied the Court that the subject matter of the immunized testimony (avoidance of New York sales taxes on jewelry purchases from two jewelers) was related to the subject matter of the federal investigation (avoidance of federal income taxes by charging personal expenses of a home renovation to corporate entities)." *Id.* at 78a.

The district court also found that the government had demonstrated, "beyond a reasonable doubt, that none of the Government's evidence before the grand jury or at trial was derived, directly or indirectly, from any immunized testimony of defendant Leona Helmsley." Pet. App. 78a-79a. The court concluded that the effect on the case of publicity regarding the Van Cleef & Arpels investigation was "of no legal significance," since "the prohibited 'use' of immunized testimony does not extend to tangential nonevidentiary uses," such as "the thought processes of a newspaper reporter whose article prompts a prosecutor's investigation and may have prompted witnesses to come forward." *Id.* at 88a.

3. At trial, the government's evidence showed that, as a result of their failure to report as income the value of personal goods and services charged to Helmsley-controlled businesses, petitioner and her husband understated their taxable income on their joint personal federal income tax returns by $245,485 in 1983, $1,146,793 in 1984, and $1,197,454 in 1985. Those omissions resulted in income tax deficiencies of $49,770, $573,396, and $598,727, respectively. Pet. App. 20a.

One of the theories of the defense with respect to the three tax evasion counts was that petitioner and her husband had actually overpaid their taxes during the relevant years. To support that theory, petitioner called Robert Schweihs and Gerald Padwe as expert witnesses. On their tax returns for the years in question, petitioner and her husband had aggregated real and personal property owned by some of their partnerships, depreciating both types of property on a "straight line" basis over a 15-year useful life (6.67% per year).[3] Based upon an appraisal of a sample of those properties, Schweihs estimated that 7.8% of the cost basis of the property subject to depreciation was attributable to personal property. Pet. App. 20a-21a.

Padwe testified that, under the accelerated cost recovery system of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 201, 95 Stat. 203-219, the Helmsleys were obligated to segregate personal property from real property and to depreciate the former over a five-year period in accordance with the

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[3] When a partnership owns property, deductions attributable to its property are allocated among the partners and reported on their personal tax returns. 26 U.S.C. 701-704. Thus, the depreciation deductions for partnerships of which the Helmsleys were members reduced their taxable income.

accelerated cost recovery schedule. Applying that method to Schweihs' percentage of the property owned by three (out of dozens of) Helmsley partnerships, Padwe concluded that the Helmsleys should have taken larger deductions for depreciation than those shown on their returns. Padwe also testified that the Helmsleys should have used a slightly different depreciation rate for real property owned by the partnerships.[4] Correction of those items, Padwe stated, would reduce the Helmsleys' taxes by amounts larger than the deficiencies proved by the government. Pet. App. 20a-22a.

The government's cross-examination exposed a number of weaknesses in Padwe's calculations. In particular, Padwe admitted that he had not considered the "recapture" provision applicable to personal property, which mandated that any gain from the sale of personal property is taxed as ordinary income (as opposed to capital gains) to the extent of any depreciation that was, or could have been, taken on the property. 26 U.S.C. 1245(a) (1982). The government's cross-examination also revealed other limitations on Padwe's analysis, including the fact that his conclusions were based only on a sample of the partnerships. Pet. App. 22a-23a, 30a-31a; see Gov't C.A. Br. 44-50.

With respect to the three tax evasion counts, the district court instructed the jury that the govern-

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[4] Relying on a schedule in a proposed Treasury Regulation that was never adopted, IRC Proposed Regulation 1.168-2 (proposed 1984), Padwe testified that the appropriate depreciation rate for the years in question was 7%. The small difference between that rate and the 6.67% rate that was used on the Helmsleys' returns, applied to the millions of dollars of property owned by the partnerships, produced greater depreciation deductions. Gov't C.A. Br. 42.

ment was required to prove beyond a reasonable doubt "that the Helmsleys owed a substantial amount of tax beyond that shown on the individual returns." Gov't C.A. Br. 66 n.*. The court left to the jury the question of "the weight, if any, to be given to [the defense experts'] testimony." *Id.* at 62 n.*. Finally, the court instructed the jury that it could disregard petitioner's evidence of offsetting depreciation deductions if the jury found "that the reason the deductions were never taken was the result of a settled method of taking depreciation, openly and consciously elected and chosen by the partnerships as part of their regular course of business." [5] The jury returned guilty verdicts on the three evasion counts, as well as 30 other counts not requiring proof of a tax deficiency.

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[5] In pertinent part, the instruction stated (Gov't C.A. Br. 68 n.*):

> Let me instruct you on how you are to consider the evidence of offsetting deductions. The defense may offer evidence of offsetting deductions that could have been taken but were not taken at the time to show that there was no tax due and owing at that time. However, if you find that the reason the deductions were never actually taken was the result of a settled method of taking depreciation, openly and consciously elected and chosen by the partnerships as part of their regular course of business, then they may not now switch that method merely to suit whatever may be their present purposes. On the other hand, if you find that the deductions were not taken because of oversight or negligence, or if you find that there was no conscious decision to forgo the deductions at the time in order to further a business purpose, then those deductions may be considered as a possible offset to the amount of taxable income claimed by the Government to result in a tax due.

4. The court of appeals affirmed the convictions. With respect to petitioner's Fifth Amendment immunity claim, the court of appeals assumed, for purposes of argument, that petitioner's immunized grand jury testimony was a cause-in-fact of the subsequent federal prosecution. Pet. App. 15a.[6] But it held that "the causal links between [petitioner's] grand jury testimony and her convictions do not implicate the Fifth Amendment." *Ibid.* "Under present caselaw," the court explained, "the Fifth Amendment prohibits the use of immunized testimony in two circumstances: (1) where the immunized testimony has some evidentiary effect in a prosecution against the witness, or (2) where there is a recognizable danger of official manipulation that may subject the immunized witness to a criminal prosecution arising out of the investigation in which the testimony is given." *Id.* at 16a. Here, the court determined, "the investigation into Mr. and Mrs. Helmsley's federal income tax practices was factually, functionally and legally separate from the state sales tax matter," and "[t]here was no evidentiary use of any kind of [petitioner's] testimony and no serious danger of manipulative use of the fact of her testimony." *Id.* at 18a, 19a.

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[6] The court postulated (Pet. App. 15a):

> [W]e accept *arguendo* [petitioner's] hypothesis that the November 1986 news stories contained information based on [petitioner's] immunized testimony; that these stories caused Pierson to renew his inquiry into the Helmsleys' income tax practices and caused previously unavailable sources of incriminating information, such as McCarthy, to emerge; that Pierson's *Post* article was the catalyst for the joint federal-state investigation; and that factual information derived from Pierson and his sources provided the basis of the subsequent prosecution and convictions of [petitioner].

A majority of the panel also rejected petitioner's claim that her tax evasion convictions should be reversed on the ground that the government failed to prove a tax deficiency. Pet. App. 19a-31a. As one basis for that determination, the court held that the district court would have been justified in excluding evidence of depreciation deductions not claimed on petitioner's returns. The court explained that the accelerated depreciation for personal property on which Padwe's testimony had been based was one of four options available under the pertinent tax provisions. Although the method petitioner used was not one of those options, the court continued, there was no set of circumstances under which petitioner could now invoke the different option maximizing her depreciation deductions as a defense to the evasion counts. *Id.* at 23a.

The court explained that if the method actually used was consciously selected, "the doctrine of election would prevent her from abandoning that choice." Pet. App. 23a. Under that doctrine, "a taxpayer who makes a conscious election may not, without the consent of the Commissioner, revoke or amend it merely because events do not unfold as planned." *Id.* at 25a. Here, the court found, there was "ample evidence in the record * * * to regard [petitioner's] original selection of a depreciation method as a strategically motivated, conscious choice." *Ibid.* Similarly, the court found that petitioner's treatment of personal property on the returns in question was "equivalent in scope and effect to the selection of an accounting method," which could not be changed without the Commissioner's consent. *Id.* at 26a-27a.[7]

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[7] The court rejected petitioner's challenge to the jury instruction regarding the election doctrine (see note 5, *supra*) on the same basis. Pet. App. 31a-32a n.8.

If the method actually used was the result of a good faith mistake, the court continued, petitioner would have been allowed to make a late election of one of the alternatives available. Pet. App. 28a. But the court concluded that because the method proposed by Padwe was not mandatory, but rather was one of several options, the possibility of a late election did not provide a defense. The court explained that "[a] showing of a deficiency cannot be rebutted by a recalculation based on the selection of the most favorable option, where other equally available options result in a deficiency." *Id.* at 27a.[8]

Finally, the majority held that "[e]ven if Padwe's testimony was admissible, it was not of sufficient weight to rebut as a matter of law the government's showing of a deficiency." Pet. App. 29a. The court noted that "Padwe's testimony was seriously undermined on cross-examination" and that "[t]here was thus ample reason for the jury to discount Padwe's conclusions as based on a wholly inadequate, and perhaps thoroughly biased, sample of partnerships that had acquired but not sold property in the relevant years." *Id.* at 29a, 31a. The court concluded that "the government established a prima facie case of tax evasion" and that a rational jury could have found the existence of a tax deficiency beyond a reasonable doubt. *Id.* at 29a, 30a.[9]

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[8] The court also rejected the argument that petitioner's accountants had used the wrong rate to compute depreciation on real estate. The court found that Padwe's adjustment of that rate was not mandatory because it was based on a proposed Treasury Regulation, not a final Regulation. Pet. App. 28a.

[9] Judge Oakes dissented from the court's disposition of petitioner's depreciation claim. Pet. App. 62a-68a. The

ARGUMENT

1. Under *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), petitioner was entitled to use immunity, in federal prosecutions, for her state grand jury testimony regarding alleged efforts by two jewelers to evade state sales taxes. The court of appeals assumed for purposes of argument that petitioner's immunized state grand jury testimony was a cause-in-fact of this prosecution and that the testimony led to discovery of certain evidence against her. Pet. App. 15a. Contrary to petitioner's contention (Pet. 8-17), however, it does not follow that this prosecution or the evidence offered against petitioner at trial amounted to a forbidden "use" of her state grand jury testimony.

a. The fundamental flaw in petitioner's argument is that "it presumes that in order for a grant of immunity to be 'co-extensive with the Fifth Amendment privilege,' the witness must be treated as if he had remained silent. This presumption focuses on the *effect* of the assertion of the Fifth Amendment privilege, rather than on the *protection* the privilege is designed to confer." *United States* v. *Apfelbaum*, 445 U.S. 115, 124 (1980). "It is * * * analytically incorrect to equate the benefits of remaining silent as a result of invocation of the Fifth Amendment privilege with the protections conferred by the privilege." *Id.* at 127. A grant of immunity need not pass a " 'but for' analysis * * * in order to * * * survive attack as being violative of the privilege against compulsory self-incrimination." *Id.* at 125-126.

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court's decision also addressed a variety of other issues not raised in the petition.

Petitioner understandably places great weight on statements in *Kastigar* to the effect that "any use" of immunized testimony is forbidden, and she quotes comparable language from *United States* v. *North*, 910 F.2d 843, 861, on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991). Pet. 8-9. *Apfelbaum* makes clear, however, that such statements cannot fairly be read to dispense with consideration of whether an asserted "use" of immunized testimony is inconsistent with the protection afforded by the Fifth Amendment. In *Apfelbaum*, the Court authorized the direct use of immunized testimony in a criminal prosecution, and it stated that "[t]his Court has never held * * * that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony." 445 U.S. at 125.

The Fifth Amendment protects a witness against compelled "testimonial self-incrimination"—the risk that information the witness is required to disclose will contribute to a criminal prosecution against the witness. See *United States* v. *Doe*, 465 U.S. 605, 613 (1984); 7 *Wigmore on Evidence* § 2260 (McNaughton rev. 1961) (analyzing the categories of facts that tend to incriminate).[10] It is only when there is a use of the facts disclosed in testimony that a person can fairly be described as having been "compelled in any criminal case to be a witness against himself," U.S. Const. Amend. V. The possibility that an observer will be moved to action on an unrelated matter involves no "self-incrimination." In that situation, the witness has not been required to provide evidence against himself or to "forge links in a chain of facts

[10] Cf. *Kastigar* v. *United States*, 406 U.S. at 454 (describing the respects in which derivative use immunity is necessary to protect the Fifth Amendment privilege).

imperiling [him] with conviction of a federal crime." *Hoffman* v. *United States*, 341 U.S. 479, 488 (1951). That is this case.

The conception of the privilege that is embodied in petitioner's position would entail a radical revision of settled Fifth Amendment principles. Suppose that petitioner had been subpoenaed to testify in a trial involving the Van Cleef & Arpels state sales tax evasion scheme and had refused to testify solely on the basis of a concern that observers who perceived a "morality connection" between her potential testimony and allegations of completely unrelated criminal conduct might, without making any use of the testimony itself, be motivated to search for or provide information on the unrelated allegations.[11] No court could properly regard such a claim—which would present no risk that compelled testimony might constitute an "injurious disclosure," *Hoffman* v. *United States*, 341 U.S. at 487—as presenting the substantial and

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[11] We have placed this hypothetical in the trial setting to highlight that petitioner's accusation that state prosecutors leaked her state grand jury testimony is immaterial. See Pet. 2-3, 6, 13 & n.10. Moreover, although the court of appeals was prepared to assume that news reports of petitioner's involvement in the alleged Van Cleef & Arpels sales tax scheme were based on her grand jury testimony, the stories identified their sources as " 'court documents' filed by two senior officers of Van Cleef & Arpels," "filings made by the Manhattan district attorney in response to the Van Cleef & Arpels defendants' motion for dismissal," and "law enforcement officials." Pet. App. 10a.

Finally, it should be noted that the logic of petitioner's position would apply to any testimony, no matter how lacking in the potential to incriminate, that might move an observer to action that could ultimately lead to a criminal investigation and prosecution. Petitioner's position cannot be limited to testimony regarding a criminal matter.

real hazard of "self-incrimination" that is necessary to support an invocation of the privilege, *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968). Petitioner's contention here is no stronger. "While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar* v. *United States*, 406 U.S. at 453.

Indeed, allowing petitioner to invoke the Fifth Amendment in the state proceeding would not have protected her from the chain of events that the court of appeals assumed here. An invocation of the privilege would also have exposed her to the risk that reporter Pierson or someone else might perceive a "morality connection" between the state sales tax matter and information or allegations regarding unrelated matters—and might act on that perception. As the court of appeals recognized (Pet. App. 19a), the Fifth Amendment privilege does not provide protection from the risk underlying petitioner's claim.

b. Petitioner's immunity claim is *sui generis*. None of the court of appeals decisions cited in the petition, including those involving the "nonevidentiary" use of immunized testimony, involve a comparable conception of the Fifth Amendment. Consequently, there is no conflict between the court of appeals' decision and decisions of other circuits.

In *United States* v. *North*, *supra*, the defendant was prosecuted for offenses involving the same subject matter as to which he had previously testified under a grant of immunity. The court of appeals held that the district court had failed to inquire sufficiently into the possibility that the immunized testimony had refreshed the recollections of witnesses called before the grand jury or at trial, or had otherwise shaped, af-

fected, or altered their testimony. 910 F.2d at 856, 860-872. All of those uses involved an effect, flowing from information provided by North pursuant to a grant of immunity, on other witnesses' testimony regarding the same events. Here, the immunized testimony bore no relation to the subject matter of the subsequent prosecution, and its substance could not have affected any witness's testimony.

Significantly, the D.C. Circuit was not called upon to consider a claim that any particular witness had been discovered as a result of the defendant's immunized testimony. The district court found in *North* that "Independent Counsel's legitimate leads to every significant witness were carefully documented." 910 F.2d at 855. The defendant did not dispute that finding; his complaint was that the district court "erred in focusing almost wholly on the IC's leads to witnesses, rather than on the content of the witnesses' testimony." *Id.* at 856. Thus, *North* did not involve a chain of events comparable to the one hypothesized here.[12] Nothing in the D.C. Circuit's reasoning sug-

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[12] Petitioner relies on observations in *North* regarding the possibility that immunized testimony had motivated a witness to come forward. Pet. 12. In light of the district court's finding, however, those statements were dicta. Moreover, none of them endorsed the "but for" reasoning on which petitioner's claim rests.

In its initial opinion, the court noted in passing that "[o]ne forbidden use of the immunized testimony is the identification of a witness," 910 F.2d at 865. That aside is most plausibly understood as a shorthand reference to the tactic of using immunized testimony as an investigatory lead. In the opinion on rehearing, the court's discussion of *United States* v. *Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987), digressed into consideration of the possibility that exposure to immunized testimony might motivate a witness to come forward and testify. 920 F.2d at 942-943 & n.1. *Rinaldi* itself involved a claim,

gests that the defendant would have been immune from a prosecution for an unrelated offense uncovered by members of the press who perceived a "morality connection" with the subject matter of the defendant's immunized testimony.[13]

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among others, that the government had used a defendant's immunized statements to identify a confederate who ultimately testified against the defendant; the court of appeals left open, but instructed the district court to consider on remand, the questions whether the immunized statements had "motivated" the confederate's anticipated testimony and "what effect, if any, that may have on its admissibility." 808 F.2d at 1584 & n.7. The *North* court also cited (920 F.2d at 942 n.1) three decisions for the proposition that "the government must prove that a witness was not motivated to testify by exposure to immunized testimony." *United States* v. *Brimberry*, 803 F.2d 908, 915-917 (7th Cir. 1986), cert. denied, 481 U.S. 1039 (1987); *United States* v. *Hampton*, 775 F.2d 1479, 1489 (11th Cir. 1985); *United States* v. *Kurzer*, 534 F.2d 511, 517-518 (2d Cir. 1976). The cited portions of those cases, like the material passage in *Rinaldi*, involved claims that the government had used information the defendant provided under a grant of immunity to assemble evidence against confederates, who in turn testified against the defendant. As the Second Circuit explained (Pet. App. 18a), petitioner could not prevail under the standards applied in such cases. See *United States* v. *Hampton*, 775 F.2d at 1488 ("Where the testimony of an immunized witness enables the government to build a case against his co-conspirator, who consequently strikes a plea bargain with prosecutors and agrees to testify against the immunized witness, the testimony of the co-conspirator must be deemed to have been indirectly derived from the testimony of the immunized witness in violation of *Kastigar*.").

[13] In *United States* v. *Poindexter*, No. 90-3125 (D.C. Cir. Nov. 15, 1991), the court faced the same type of claim that was advanced in *North*—*i.e.*, that the defendant's immunized testimony had refreshed the recollection of witnesses against him or had otherwise shaped their testimony. The

Other cases addressing alleged "nonevidentiary" uses of immunized testimony have all involved claims that the prosecutor gained an advantage as a result of becoming familiar with the contents of immunized testimony. *E.g.*, *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (suggesting that "such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy").[14] In our view, petitioner overstates the degree to which courts have diverged in considering such claims. But in any event, the Court has declined to hear other cases presenting that question, and this case would not call for clarification of the particular standards governing claims of that nature. The absence of any relation between petitioner's immunized testimony and the charges in this case forecloses any contention that the government could have derived a tactical advantage from petitioner's immunized testimony. Moreover, as the district court found, the prosecutor "never read [petitioner's] grand jury testimony, was never informed of its con-

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court held that the prosecution could not sustain its burden of showing no such use with respect to Oliver North's testimony, and it reversed the convictions on that basis. That holding entailed no consideration of the causation-in-fact standard embodied in petitioner's position.

[14] See *United States* v. *Mariani*, 851 F.2d 595 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); *United States* v. *Crowson*, 828 F.2d 1427 (9th Cir. 1987), cert. denied, 488 U.S. 831 (1988); *United States* v. *Byrd*, 765 F.2d 1524 (11th Cir. 1985); *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983); *United States* v. *First W. State Bank*, 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974). See also *United States* v. *Serrano*, 870 F.2d 1 (1st Cir. 1989).

tents, never discussed the contents, and never saw any exhibits relevant to the grand jury proceedings." Pet. App. 83.

2. Three of the 33 counts on which petitioner was convicted charged her with attempting to evade taxes. See 26 U.S.C. 7201. To establish a violation of that statute, the government must prove (1) the existence of a tax deficiency, (2) an affirmative act of evasion or attempted evasion of the tax due, and (3) willfulness. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965); *United States* v. *Williams*, 875 F.2d 846, 849 (11th Cir. 1989). Petitioner argues that the court of appeals in effect relieved the government of its burden on the first element. First, she maintains (Pet. 19-24) that the court of appeals misapplied the doctrine of election to the particular facts of this case. Second, she contends (Pet. 25-28) that her expert testimony regarding unclaimed depreciation was "uncontroverted" and thus entitled her to a judgment of acquittal. The court's disposition of those issues was well founded, and neither presents a question of general importance calling for this Court's review.

a. Relying on the doctrine of election, the court of appeals concluded that petitioner's depreciation defense was insufficient as a matter of law. Petitioner would be entitled to relief from her convictions only if she could establish that that determination was incorrect and, in addition, that the issue should not have been submitted to the jury under the standards set forth in the district court's instructions.

Taxpayers are often called upon to decide on the tax treatment of various items at a point when the ultimate financial consequences cannot be fully anticipated. The doctrine of election, which this Court has recognized in the civil context, provides that a tax-

payer who makes a conscious choice regarding such an issue may not later adopt a different approach simply because subsequent developments make that alternative appear more advantageous. *J.E. Riley Investment Co.* v. *Commissioner*, 311 U.S. 55 (1940); *Pacific National Co.* v. *Welch*, 304 U.S. 191 (1938). In keeping with that principle, the courts of appeals have refused to allow taxpayers to revise the tax treatment of various items for the purpose of eliminating a deficiency in a tax evasion prosecution. See, *e.g.*, *United States* v. *Santarelli*, 778 F.2d 609, 617 (11th Cir. 1985); *Fowler* v. *United States*, 352 F.2d 100, 106 (8th Cir. 1965), cert. denied, 383 U.S. 907 (1966); *United States* v. *Kleifgen*, 557 F.2d 1293, 1297-1298 & n.9 (9th Cir. 1977).

The application of that doctrine to tax evasion cases is entirely consistent with the statutory requirement of proving a deficiency. A deficiency is present when a taxpayer reports or pays less than the amount due, given the manner in which he has treated his affairs for tax purposes.[15] The amount actually reported or paid is not measured against the sum that the taxpayer would owe if he were allowed, with the benefit of hindsight, to reconstruct his tax returns for the years in issue. See *United States* v. *Santarelli*, 778 F.2d at 617 (noting that such an approach "would make a mockery of the federal income tax

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[15] See *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974) ("while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, * * * and may not enjoy the benefit of some other route he might have chosen to follow but did not").

system"). That is so whether or not the taxpayer has delegated to experts the task of making the decisions embodied in the original returns. There is no merit, therefore, to petitioner's sweeping assertions that the doctrine of election involves an "automatic waiver" of a constitutional right or constitutes a delegation to the Commissioner of the power to criminalize conduct. Pet. 20-21 & n.14.

Petitioner concedes, in fact, that the doctrine of election may properly be applied where a taxpayer has chosen an alternative authorized by the tax laws. See Pet. 22 ("in that situation, the original choice *can* produce a tax deficiency—that is, an underpayment of taxes under a legally proper tax return"). The narrow issue in this case arises from the fact that, with respect to some of their partnerships, the Helmsleys depreciated personal property over a recovery period that was not among the alternatives prescribed by the then-applicable tax laws.

During the relevant period, 26 U.S.C. 168(b)(1) (1982) provided for the computation of depreciation on personal property (referred to by the Code as "5-year" property) under the accelerated cost recovery system. Under that system, such property was depreciated over 5 years (15% in the first, 22% in the second, and 21% in each of the last three). 26 U.S.C. 168(b)(1) (1982); see Pet. App. 24a. A taxpayer could, however, elect to use the straight line method of computing depreciation. 26 U.S.C. 168(b)(1) and (b)(3) (1982). A taxpayer who elected to use the straight line method also selected a recovery period prescribed by the statute. 26 U.S.C. 168(b)(3) (1982). In the case of personal property ("5-year property"), the taxpayer could elect a recovery pe-

riod of 5, 12, or 25 years. *Ibid.* The election not to use the accelerated recovery schedule was made on the return for the year in which property was put into service. 26 U.S.C. 168(f)(4) (1982). Once an election was made, it could not be revoked without the consent of the Commissioner of Internal Revenue. 26 U.S.C. 168(f)(4)(C) (1982).

In this case, the Helmsleys did not segregate the personal property held by some of their partnerships. See Pet. App. 25a (noting that property was segregated in other partnerships). Instead, they aggregated it with the real property and depreciated both types of property under the straight line method over a recovery period of 15 years. The evidence justified the conclusion that this method of depreciation represented a "strategically motivated, conscious decision," *ibid.*, and the district court's instruction permitted the jury to rely on the doctrine of election only if it made such a finding. See note 5, *supra.* This case thus presents only the question whether—given a deliberate decision to depreciate personal partnership property on a straight line basis over a period of 15 years—petitioner was entitled to invoke both a different method of depreciation and the most favorable available recovery period.

As the court of appeals held, the election doctrine forecloses such a recalculation. During the relevant period, the tax laws permitted depreciation on a straight line basis, and they gave taxpayers the option to employ recovery periods in excess of 5 years (either 12 years or 25 years). Petitioner plainly elected not to use the accelerated method, the only one as to which her expert testified. Having elected an authorized method of depreciation and a recovery period in excess of two of the three actually au-

thorized, petitioner was not entitled to have her tax recalculated on the basis of a method and a recovery period she plainly chose not to use.

Moreover, petitioner's election of a depreciation method was equivalent to the selection of an accounting method. Even if an accounting method is incorrect as a matter of law, a taxpayer is not entitled to change it unless consent to change the method is sought and obtained from the Commissioner. 26 U.S.C. 446(e); 26 C.F.R. 1.446-1(e)(2)(i) (1957); *Witte* v. *Commissioner*, 513 F.2d 391 (D.C. Cir. 1975); *United States* v. *Kleifgen*, 557 F.2d at 1297 n.9.

Contrary to petitioner's contention (Pet. 23), the court of appeals' decision does not conflict with *United States* v. *Wilkins*, 385 F.2d 465, 466-471 (4th Cir. 1967), cert. denied, 390 U.S. 951 (1968). In *Wilkins*, the defendant was convicted of attempting to evade taxes for 1960. On his tax return for that year, he included income he had received in 1958 and 1959 from a land sale transaction, but he underreported the income and claimed fraudulent expenses related to the transaction. The government's theory was that he had elected to treat the income from the transaction as received in 1960 and thus that the unreported income from the transaction should likewise be treated as income for 1960. The Fourth Circuit rejected that theory, finding that the Code did not permit recognition of any of the income in that year. 385 F.2d at 469-471. Significantly, the court was not called upon to determine how to address the situation involved in this case. Here, petitioner seeks not only to avoid a conscious election of an unauthorized treatment of an item, but also to disregard those aspects of her prior elections that were authorized.

b. Petitioner's expert testimony did not entitle her to a judgment of acquittal. To prove a deficiency, the government established that petitioner and her husband failed to pay taxes on substantial amounts of income—consisting of the value of personal goods and services charged to Helmsley-controlled businesses—in each of the years in question. There is no dispute that proof of this nature is sufficient to sustain a conviction for tax evasion. The government is not required to anticipate and disprove any possible offset that might be available to a taxpayer.[16]

Petitioner sought, through expert testimony, to show that a different method of depreciation would have produced greater deductions during the relevant tax years. The government's cross-examination of tax expert Padwe demonstrated, however, that his calculations were based on a limited (and potentially biased) sample of partnerships and that he failed to address all of the tax consequences of his theory.[17]

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[16] *E.g.*, *United States* v. *Campbell*, 351 F.2d 336, 339 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966); *Elwert* v. *United States*, 231 F.2d 928, 933 (9th Cir. 1956); *United States* v. *Bender*, 218 F.2d 869, 871 (7th Cir.), cert. denied, 349 U.S. 920 (1955); *United States* v. *Link*, 202 F.2d 592, 593-594 (3d Cir. 1953). See *Holland* v. *United States*, 348 U.S. 121, 138-139 (1954) (the rule that the government is not required to "negate every possible source of nontaxable income" in a net worth case does not shift burden of proof; "[o]nce the Government has established its case, the defendant remains quiet at his peril").

[17] In *Small* v. *United States*, 255 F.2d 604 (1st Cir. 1958), by contrast, the defendant was prosecuted for attempting to evade the tax on a gain on the sale of his home. He presented proof that he had expended funds to improve the house in an amount that exceeded the difference between his purchase price and the sale price, and, therefore, that he had no gain. The court noted that this evidence "was

In particular, the calculation failed to account for the fact that higher depreciation deductions result, under the "recapture" provisions of the Internal Revenue Code, in the conversion of capital gain into ordinary income when personal property is sold. See Pet. App. 30a-31a. Petitioner nonetheless portrays her expert's testimony as "uncontroverted" (Pet. 27), suggesting that the government's cross-examination was based "on the mere (alleged) failure of petitioner's expert to consider those matters closely, not on any evidence that these possibilities were real." Pet. 26 n.20. Petitioner's characterization is unfounded (see Gov't C.A. Br. 43-50, 58-61), but for present purposes the important point is that the matter turns on the particulars of Padwe's testimony, an issue that does not warrant this Court's attention.

As the court of appeals found, the jury was entitled to determine the weight, if any, that Padwe's recalculation carried and whether it established a reasonable doubt as to the existence of a deficiency. There is no reason to apply a different approach to factual disputes regarding the existence of a deficiency in a tax evasion case than to any other issue of fact.

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not rebutted in any manner by the government." 255 F.2d at 607 (emphasis added). *Small* cannot fairly be read as holding that cross-examination is an insufficient response, as a matter of law, to that type of testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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